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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Waymo LLC,

Plaintiff,

v.

Uber Technologies, Inc.; Ottomotto LLC; Otto
Trucking LLC,

Defendants.

Case No. 3:17-cv-00939

**OTTO TRUCKING'S RESPONSE TO
PARAGRAPH FOUR OF THE COURT'S
ORDER RE EARLY MOTIONS IN
LIMINE AND RELATED MATTERS
[DKT. NO. 784]**

Judge: Hon. William H. Alsup
Trial Date: October 10, 2017

Regardless of Anthony Levandowski's ("Mr. Levandowski") employment status, the Court should not draw an adverse inference against Defendant Otto Trucking LLC ("Otto Trucking") because (1) such an inference would be improper, as Mr. Levandowski is a non-party to this suit; and (2) Waymo cannot establish corroborating evidence for any adverse inferences it seeks against Otto Trucking.

A. It Would Be Improper To Draw Any Adverse Inference against Otto Trucking Based On Mr. Levandowski's Invocation of the Fifth Amendment.

While a court may draw an adverse inference from a *party's* invocation of the Fifth Amendment right in a civil case, whether to draw such an inference based on a *non-party's* invocation requires a court to consider "the circumstances of a given case, rather than the status of a particular non-party witness.[]" *In re WorldCom, Inc.*, 377 B.R. 77, 109 (Bankr. S.D.N.Y. 2007). Courts in this circuit have refused to draw an adverse inference where, as here, the individual invoking the Fifth Amendment right against self-incrimination is not a party to the claim and the plaintiff has promulgated independent evidence of facts surrounding the adverse inference. *See Mattel, Inc. v. MGA Entm't, Inc.* 782 F.Supp.2d 911, 970 n. 19 (C.D. Cal. 2011)(refusing to draw an adverse inference where plaintiff's former and defendant's current employee was not a party to a trade secret misappropriation claim and plaintiff "independently discovered and tracked [the non-party's alleged] wrongdoing through forensic hardware analysis."); *In re Tableware Antitrust Litig.*, No. C 04 3514 VRW, 2007 WL 781960 at *5 (N.D. Cal. Mar. 13, 2007) (finding that before allowing plaintiff to draw an adverse inference against defendant's former CEO for invoking the Fifth Amendment, plaintiff would need to establish "independent evidence of the surrounding facts before any portion of [the CEO's] deposition testimony will be admitted.").

Waymo has chosen not to assert any claims against Mr. Levandowski, repeatedly stating he is "not a party" to this lawsuit in a strategic move to avoid arbitration. *See* Dkt. No. 204 at 10. Waymo should not be permitted to flout the limitations of this tactical choice by seeking an adverse inference against Otto Trucking. , Mr. Levandowski's invocation of the Fifth Amendment should have no bearing on Otto Trucking's ability to put on a defense; an adverse inference would

severely and impermissibly prejudice Otto Trucking and should therefore be denied.

B. Waymo Has No Independent Corroborating Evidence Against Otto Trucking.

Waymo cannot produce independent corroborating evidence to permit any adverse inference. *See Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) (“[W]hen there is no corroborating evidence to support the fact under inquiry, the proponent of the fact must come forward with evidence to support the allegation, otherwise no negative inference will be permitted.”).

Waymo has no evidence to support any inference that Otto Trucking actually possessed or used its alleged trade secrets based on Mr. Levandowski’s invocation of the Fifth Amendment. It is undisputed that Otto Trucking does not develop LiDAR systems. Otto Trucking has never made, used, offered for sale, sold, imported, developed, disclosed, or acquired any of the LiDAR technology that is the subject of Waymo’s trade secret misappropriation claim. There is no case law supporting imposition of an adverse inference against a party, Otto Trucking, based solely on the invocation of Fifth Amendment rights by a managing member, particularly where there is no corroborating evidence.

For the foregoing reasons, the Court should not permit any adverse inferences against Otto Trucking based on Mr. Levandowski’s assertion of his Fifth Amendment right against self-incrimination.

Dated: July 7, 2017

Respectfully submitted,

By: /s/ Brett Schuman

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on **July 7, 2017**. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct.

Executed **July 7, 2017**

/s/ Brett Schuman
Brett Schuman